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BENEFITS INC.



WHAT YOU NEED TO KNOW



## Compliance Recap

January 2017

January was a significant month in the employee benefits world because the new U.S. administration issued an Executive Order announcing its intent to repeal the Patient Protection and Affordable Care Act (ACA). However, January was a relatively inactive month for new laws and administrative rulemaking because the new administration placed a freeze on rulemaking until presidential nominations of agency heads are confirmed.

The Department of Health and Human Services (HHS) released the 2017 poverty guidelines. The Department of Labor (DOL) released its inflation-adjusted civil monetary penalty amounts and an FAQ regarding the contraceptive services objection accommodation. The DOL, HHS, and the Treasury Department released FAQs about family HRA integration with a non-HRA group health plan. The IRS released its 2017 version of the Employer's Tax Guide to Fringe Benefits and a memo on fixed indemnity health plan benefits tax treatment.

### UBA Updates

UBA released 6 new advisors in January:

- [IRS Q&A About Employer Information Reporting on Form 1094-C and Form 1095-C](#)
- [Small to Mid-Size Employer Guide](#)
- [DOL Releases FAQ Regarding Contraceptive Services Coverage Objection Accommodation](#)
- [Executive Order from President Trump on the ACA](#)
- [IRS Memo on Fixed Indemnity Health Plan Benefits Tax Treatment](#)
- [Qualified Small Employer Health Reimbursement Arrangements and ERISA](#)

UBA updated existing guidance:

- [IRS Releases 2016 Forms and Instructions for 6055/6056 Reporting](#)
- [Making Changes in Measurement and Stability Periods](#) (previously called IRS Notice Addresses Handling of Changes in Measurement and Stability Periods)
- [IRS Reporting Tip #1 – 2016 Form 1094-C, Line 22](#)
- [Qualifying Small Employer Health Reimbursement Arrangements FAQ](#) (previously called Qualifying Small Employer Health Reimbursement Accounts FAQ)

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## President Trump Signs Executive Order

On January 20, 2017, President Trump signed [Executive Order: Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal](#).

The Executive Order directs the Department of Health and Human Services' Secretary and the heads of all other executive departments and agencies with authority or responsibility under the Patient Protection and Affordable Care Act (ACA) to exercise all authority and discretion to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the ACA that would impose a fiscal burden on any state, or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

The Executive Order indicates that the Administrative Procedure Act and its rulemaking process still apply to regulatory revisions. Because confirmation proceedings are not concluded for the heads of the Departments of Health and Human Services, Labor, or the Treasury, the agencies are in a [rule promulgation freeze](#) until presidential nominations are confirmed.

[Read more about the Executive Order.](#)

## HHS Releases 2017 Federal Poverty Guidelines

The [2017 poverty guidelines](#) (also referred to as the FPL) were released by the Department of Health and Human Services (HHS). For a family/household of 1 in the contiguous United States, the FPL is \$12,060. In Alaska, the FPL is \$15,060 and in Hawaii the FPL is \$13,860. Applicable large employers that wish to use the FPL affordability safe harbor under the employer shared responsibility/play or pay rules should ensure that their lowest employee-only premium is equal to or less than \$97.38 a month, which is 9.69 percent of the FPL.

## DOL Releases Inflation-Adjusted Federal Civil Penalty Amounts

On January 18, 2017, the Department of Labor issued the [Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017](#) which is its first annual adjustment of federal civil monetary penalties. Here are some of the adjustments:

- Form 5500: For failure to file, the maximum penalty increases from \$2,063 to \$2,097 daily for every day that the Form 5500 is late.
- Summary of Benefits and Coverage: For failure to file, the maximum penalty increases from \$1,087 to \$1,105 per failure.
- Genetic Information Nondiscrimination Act: For violations, the maximum penalty increases from \$110 per participant per day to \$112.

The adjustments are effective for penalties assessed after January 13, 2017, for violations occurring after November 2, 2015.

## DOL Releases FAQ Regarding Contraceptive Services Objection Accommodation

As part of implementing the Patient Protection and Affordable Care Act (ACA), the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the Departments) issued regulations to require coverage of women's preventive services, which essentially includes all FDA-

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approved contraceptives, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by the health care provider (collectively, contraceptive services).

The regulations exempt group health plans of “religious employers” (specifically defined in the law) from the requirement to provide contraceptive coverage. Later, amended regulations provide an accommodation for eligible organizations – which are not eligible for the religious employer exemption – that object on religious grounds to providing coverage for contraceptive services. Because of litigation, the Departments extended the accommodation to closely held for-profit entities.

Under the accommodation, an eligible organization that objects to providing contraceptive coverage for religious reasons may either:

1. self-certify its objection to its health insurance issuer (to the extent it has an insured plan) or third party administrator (to the extent it has a self-insured plan) using a form provided by the Department of Labor (EBSA Form 700); or
2. self-certify its objection and provide certain information to HHS without using any particular form.

Most recently, in 2016, the U.S. Supreme Court considered claims by several employers that, even with the accommodation provided in the regulations, the contraceptive coverage requirement violates the Religious Freedom Restoration Act (RFRA). The Court heard oral arguments and ultimately remanded the case (and parallel RFRA cases) to the lower courts to give the parties “an opportunity to arrive at an approach going forward that accommodates [the objecting employers’] religious exercise while at the same time ensuring that women covered by [the employers’] health plans ‘receive full and equal health coverage, including contraceptive coverage.’”

To address the Court’s statement, the Departments published their request for information (RFI) regarding the Court’s statement and received more than 54,000 public comments. Based on the comments submitted, the Departments released [FAQs About Affordable Care Act Implementation Part 36](#) to indicate that they not making changes to the accommodation for the following reasons:

- No feasible approach has been identified that would resolve the religious objectors’ concerns, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage.
- The process described in the Court’s supplemental briefing order would not be acceptable to those with religious objections to the contraceptive coverage requirements.
- There are administrative and operational changes to a process like the one described in the Court’s order that are more significant than the Departments had previously understood and that would potentially undermine women’s access to full and equal coverage.

[Read more about the FAQ.](#)

### **Agencies Release FAQs About Family HRA Integration with Non-HRA Group Health Plan**

The Departments of Labor, Health and Human Services, and the Treasury (collectively, the Departments) released [FAQs About Affordable Care Implementation Part 37](#) to address health reimbursement arrangement (HRA) integration with group health plans.

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The Departments indicate that, for purposes of determining whether a family HRA is “integrated” with a non-HRA group health plan, an employer may rely on an employee’s reasonable representation that the employee and other individuals covered by the family HRA are also covered by another qualifying non-HRA group health plan.

Also, a family HRA is permitted to be integrated with a combination of coverage under other qualifying non-HRA group health plans if all individuals who are covered under the family HRA are also covered under other qualifying non-HRA group health plan coverage.

For example, a family HRA covering an employee, spouse, and one dependent child may be integrated with the combination of (1) the employee’s self-only coverage under the non-HRA group health plan of the employee’s employer, and (2) the spouse and dependent child’s coverage under the non-HRA group health plan of the spouse’s employer, if both non-HRA group health plans are qualifying non-HRA group health plans.

### **IRS Releases 2017 Version of the Employer’s Tax Guide to Fringe Benefits**

The IRS released its 2017 Version of [Publication 15-B](#) which provides information on the employment tax treatment of various fringe benefits. Fringe benefits are taxable unless an exclusion applies. The publication lists the qualified benefits that a cafeteria plan may include and examples of benefits that a cafeteria plan is not permitted to include. It also provides the 2017 dollar limits for various benefits.

### **IRS Issues Memo on Fixed-Indemnity Health Plan Benefits Tax Treatment**

On January 20, 2017, the IRS released a [Memorandum](#) on the tax treatment of benefits paid by fixed-indemnity health plans that addresses: (1) whether payments to an employee under an employer-provided fixed-indemnity health plan are excludible from the employee’s income under Internal Revenue Code §105, and (2) whether payments to an employee under an employer-provided fixed-indemnity health plan are excludible from the employee’s income under Internal Revenue Code §105 if the payments are made by salary reduction through a §125 cafeteria plan.

Some examples of fixed indemnity health plans are AFLAC or similar coverage, or cancer insurance policies.

Generally, the Internal Revenue Code imposes taxes on wages paid with respect to employment. For federal income tax withholding, the Internal Revenue Code generally requires every employer who pays wages to deduct and withhold taxes on those wages.

The IRS concluded that an employer may not exclude payments under an employer-provided fixed-indemnity health plan from an employee’s gross income if the coverage’s value was excluded from the employee’s gross income and wages. Further, an employer may not exclude payments under an employer-provided fixed-indemnity health plan if the plan’s premiums were made by salary reduction through a §125 cafeteria plan.

In the context of an employer-provided fixed-indemnity health plan, when the employer’s payment for coverage by the fixed-indemnity plan is excluded from the employee’s gross income, then the payments by the plan are not excluded from the employee’s gross income.

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In contrast, when the premiums are paid with after-tax dollars, the payments by the plan are excluded from the employee's gross income.

[Read more about the IRS Memorandum.](#)

### Question of the Month

**Q.** Now that President Trump signed an Executive Order directing the Secretary of the Department of Health and Human Services to exercise all authority and discretion to waive, defer, grant exemptions from, or delay the implementation of any requirement of the ACA that would impose a cost, fee, tax, penalty, or regulatory burden on purchasers of health insurance, does an applicable large employer need to complete ACA reporting?

**A.** Yes. Until a statute or regulation is repealed or replaced, or the head of a federal agency indicates that it does not intend to enforce compliance with a regulation, employers should continue to comply with current applicable laws such as ACA reporting for applicable large employers.

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